

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

76-1460

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

DOCKET NO. 76-1460

UNITED STATES OF AMERICA,
APPELLEE,
-vs-
JESUS ORTIZ,
APPELLANT

On Appeal From The United States District Court
for The District of Connecticut

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

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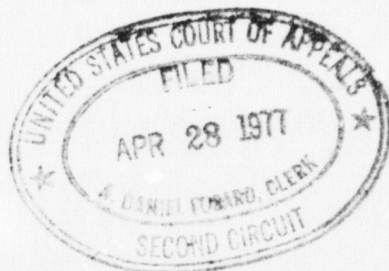


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PETITION FOR REHEARING
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Pursuant to Fed. R. App. P. 35 and 40, Jesus Ortiz petitions this Court for a rehearing of his appeal from a criminal conviction, and he alternatively suggests rehearing en banc. This case presents this Court with its first opportunity to give a reasoned explication of Fed. R. Evid. 609(a), a highly significant provision which establishes new principles governing the use of prior convictions to

impeach the credibility of witnesses. The opinion of the panel majority (slip op. 2789, decided April 11, 1977) misapprehends the thrust of Rule 609 and significantly understates the degree to which the new Rule departs from prior law, thereby arriving at an incorrect application of the rule to the facts of this case.

1. Contrary to the express statement of the majority, Evidence Rule 609(a) represents a considered and substantial departure from the prior law of the Circuit.

The analysis of the panel majority is based on the mistaken premise that "Rule 609(a) is essentially the same as the rule in this Circuit prior to its enactment" Slip op. at 2792 n.4.^{1/} To the contrary, under prior law, a heavy burden rested on the defendant to justify exclusion from evidence of his prior conviction. United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969), while rejecting the view that a judge must admit evidence of every felony conviction, authorized exclusion only where the prior record "negates credibility only slightly but creates a substantial chance of unfair prejudice." Id. at 273; accord, United States v. DiAngelis, 490 F.2d 1004, 1009 (2d Cir.), cert. denied, 416 U.S. 956 (1974). Rule 609(a)(1),

^{1/} The reference to 3 Weinstein's Evidence ¶609[03], at 609-62 to 64 & n.2 (1975) as support for the notion that Rule 609 is "essentially the same" as prior law is overstated. Judge Weinstein simply comments that Rule 609 is "not unprecedented," because, like prior law, it contemplates the exercise of judicial discretion.

by contrast, permits admission of such evidence only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." Fed. R. Evid. 609(a)(1).^{2/} Thus, unlike this Court's former standard, the new Rule deliberately favors exclusion by (1) putting the burden on the government to justify admission, (2) eliminating the notion that only "substantial" and "unfair" prejudice is pertinent, and (3) limiting the relevant judicial examination of prejudice to that accruing "to the defendant." The significant changes effected by Rule 609 have been carefully explicated in a recent, scholarly opinion of the District of Columbia Circuit, United States v. Smith (Gartrell), Nos. 75-1920, 1941 (Dec. 17, 1976), slip op. at 16-38. That court, which originated the Luck-Gordon rule later followed in this Circuit's Palumbo decision, pointed out that reliance on that test would now be "misplaced." Id. at 28. Indeed, the court remanded Gartrell's case to the district court, because the record showed that the trial judge had applied prior law rather than the standard of Rule 609(a)(1). Id. at 17-18, 38.

The new formulation contained in Rule 609(a) is the

^{2/} Fed. R. Evid. 609(a)(2) provides, in quite different terms, that evidence of convictions involving "dishonesty or false statement" "shall be admitted." As both the majority and the dissent correctly recognize, this provision is not applicable to a drug sale conviction. See also Government of Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976); United States v. Millings, 535 F.2d 121 (D.C. Cir. 1976) (defining crimen falsi).

carefully drafted result of a hardfought and deliberate legislative process.^{3/} The majority opinion completely disregards this Congressional action. Thus, the decision arrives at the wrong answer in this case by asking the wrong question.

2. Under a proper application of Rule 609(a)(1) the conviction should be reversed.

The majority reasons that the appellant's prior narcotics sale conviction "is probative on the issue of credibility," slip op. at 2792, and that the district judge had an "opportunity for full consideration of all the factors before exercising his discretion," id. at 2793, specifically suggesting that the appellant did not show how his testimony in his own behalf would have been helpful and that it "would have been unfair and misleading," id., for the appellant to have appeared "pristine," id., while his sole accuser was shown to have an extensive criminal record. The short and simple answer to the last point is that impeachment of the paid informer was governed by the same rule that applied to the defendant. The government was entitled to protect its witness from unlawful impeachment; whether or not it did so has no bearing on the "fairness" of giving the accused the full benefit of the

^{3/} Indeed, the final view of the Senate Committee and also of the whole House was to forbid impeachment of criminal defendants by prior convictions (other than crimen falsi) altogether. Gartrell, supra, at 26; 4 U.S.C. Cong. & Adm. News 7051, 7084-85 (1974).

protection from prejudice Congress granted in Rule 609.^{4/} Nor has this or any other Court ever previously indicated that a defendant must make an explicit offer of proof to demonstrate that his taking the witness stand in his own behalf would be beneficial to his case. Not only was it clear here that his other witnesses could not give a complete alibi (see slip op. at 2803 n.4 (Mansfield, J., dissenting)), but any defendant is also entitled to believe that he stands a better chance of acquittal if he faces the jury and tells his story.^{5/}

The question whether the defendant would unfairly appear "pristine," slip op. at 2794, is not a matter within the purview of Rule 609. By taking the witness stand, a defendant puts his credibility in issue, but not necessarily his character. Compare Rule 609 with Rule 404. The trial judge properly allowed a probing cross-examination of the informer, cf. United States v. Harvey, 547 F.2d 720, 723 (2d Cir. 1976), but the defendant's full exercise of his right to confrontation has no proper bearing on how his own credibility could be attacked if he took the witness stand.

^{4/} To the extent that the majority is suggesting that there would be prejudice to the government in allowing the defendant to testify without impeachment, it relies on a factor expressly written out of the Rule, which refers only to "prejudice to the defendant" (emphasis added).

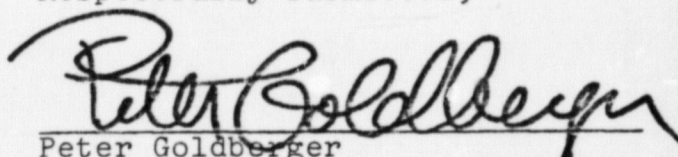
^{5/} This belief would be amply supported by the available evidence. Kalven and Zeisel, The American Jury, 160 (1966) (testifying defendants fare much better, regardless of the weight of the government's case).

The issue under Rule 609(a)(1) is not simply whether the prior conviction bears on credibility. For the reasons expressed by the majority, id. at 2792, cf. dissent at 2797, the Rule appears to assume that every felony conviction has some such tendency. The question is whether the degree of probative value outweighs prejudice to the defendant. Here it clearly did not. The probative value depended solely on a vague and uncertain inference about the sort of person who would ever have sold a narcotic. The prejudice to the defendant, on the other hand, was substantial and certain. The prosecution case was not strong; it depended solely on the credibility of a paid informer with a long criminal record. The defendant's testimony in his own behalf, including his demeanor as a witness, would have been crucial to his defense. United States v. Brown, 409 F. Supp. 890, 892 (W.D.N.Y. 1976). Most important, the prior offense and the current charge were strikingly similar and of an emotionally charged character. Cf. Carter v. United States, 549 F.2d 77, 79 (8th Cir. 1977) (Lay, J., dissenting: "In today's society there can be nothing more prejudicial" than an aspersion of drug involvement; Rule 403). The prior conviction was for sale of small quantities of heroin, while the charge in this case was sale of a small quantity of cocaine. See United States v. Puco, 453 F.2d 539, 542-43 (2d Cir. 1971). Given the extremely limited probative value of the prior conviction on the issue of credibility, the factors pointing to prejudice should have required its exclusion under the test of Rule 609(a)(1).

CONCLUSION

The majority opinion in this case is based on a misapprehension of the governing law. Congress carefully reformulated Rule 609 to deal with the serious "danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record." Conference Report 93-1597, 93d Cong., 2d Sess. (Dec. 14, 1974), reprinted in 4 U.S.C. Cong. & Adm. News 7051, 7103 (1974). By applying the now repudiated standard which prevailed before the enactment of the Federal Rules of Evidence, the panel upholds an erroneous ruling which kept the defendant from taking the witness stand and led to his conviction on the uncorroborated word of a paid informer. For these reasons and those further reasons stated by Judge Mansfield in dissent, the panel should rehear the case and reverse its original ruling. Alternatively, the appellant suggests that the case be heard en banc, because the panel majority incorrectly decided an extremely important and recurring issue in the application of the new Federal Rules of Evidence.

Respectfully submitted,



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Dated: April 25, 1977

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CERTIFICATE

I hereby certify that a copy of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc was mailed to Thomas P. Smith, Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut, 06103, this 25th day of April, 1977.

A handwritten signature in cursive script, reading "Peter Goldberger", written over a horizontal line.

